IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SANDRA L. PALLATTO, Plaintiff, vs. WESTMORELAND COUNTY CHILDREN'S BUREAU, a local agency of Westmoreland County, Defendant.	**ELECTRONICALLY FILED** No. 2:11-cv-01206 The Honorable David S. Cercone **JURY TRIAL DEMANDED**

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

AND NOW, comes the Defendant, Westmoreland County Children's Bureau (WCCB), a local agency of Westmoreland County, by and through its attorneys, Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. and Thomas P. Pellis, Esquire, and files the within Brief in Support of Defendant's Motion for Summary Judgment, averring in support thereof as follows:

I. STATEMENT OF THE CASE

Sandra L. Pallatto filed this lawsuit against her employer, the Westmoreland County Children's Bureau, alleging that WCCB harassed her because of a disability and for taking medical leave, created a hostile work environment, and constructively discharged her from her employment as caseworker. Plaintiff brought this action pursuant to the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., the Family Medical Leave Act (FMLA), 29 U.S.C. §2601 et seq., and the Pennsylvania Human Relations Act, 43 P.S. §951 et seq.

The salient facts follow: Westmoreland County hired Pallatto as a substitute caseworker in 1995, and later that year placed her on full-time status. (Exhibit A-Hiring Letter.) (Exhibit B-Action Form.) Pallatto worked as a caseworker for fifteen years until she retired in 2010. She was represented by the Teamsters Union and the terms and conditions of her employment were governed by a collective bargaining agreement. (Exhibit C-Collective Bargaining Agreement.)

Caseworkers are responsible for protecting vulnerable children. They investigate allegations of child abuse and neglect and take action to protect the safety and welfare of children including crisis intervention and foster home placement. The essential duties of a caseworker include: (1) ensuring the safety of children by conducting home visits as required, taking emergency custody of children, investigating allegations of neglect and abuse, interviewing children and parents and professionals, and assessing risk; (2) determining the need for protective services, provides crisis intervention, and maintaining contact with service providers; (3) preparing court petitions and motions, testifying at hearings, and arranging for witnesses; and (4) maintaining case records, preparing case histories, and maintaining expense and travel records. (Exhibit D-Position Description--Children's Bureau Caseworker.)

During the fifteen years she was employed as a caseworker, Pallatto was the subject of numerous legitimate and reasonable disciplinary actions, all of which related to her essential duties as a caseworker.

In 1997 and 1998, WCCB counseled and warned Pallatto for failing to maintain her caseload. (Exhibits E and F-Employee Conference Forms.) Also, Pallatto was counseled by WCCB because, following a report of abuse, she failed to see a child in the time mandated by statute. (Exhibit G-Employee Conference Form.)

During the period from 1999 through 2004, WCCB counseled and/or issued warnings to Pallatto for violation of agency call off policy, failure to sign in on time sheets, failure to have paperwork in order for case documentation, and failure to have her paperwork meet agency standards. (Exhibits H, I, J and K-Memoranda and Conference Forms dated January 22, 1999, March 11, 1999, June 13, 2002 and January 6, 2004.)

On August 18, 2004, an issue arose about Pallatto's whereabouts while working outside the office and purportedly conducting home visits. (Exhibit L-Memorandum of Annette Gross dated August 18, 2004.) Pallatto was scheduled to meet with four families on August 4, 2004; however, those families reported to WCCB that Pallatto had not visited their homes. Pallatto told WCCB that she had made unannounced visits to families who were not at home or did not answer the door. (Exhibit L.) The Westmoreland County Manager directed Pallatto's supervisor, Michelle Bianco, to be vigilant regarding Pallatto's whereabouts. (Exhibit M-Memorandum to Bianco dated August 11, 2004.) The County Manager also reported at this time that Pallatto had failed to attend a hearing involving a child in agency custody. (Exhibit M.)

Because Pallatto conducted frequent unannounced home visits, she was not seeing all the children on her caseload. On January 7, 2005, Michelle Bianco again informed Pallatto of her duty to have face-to-face contact with all children on at least a monthly basis. (Exhibit N-Memorandum to Pallatto dated January 7, 2005.) In large part, because of Pallatto's frequent use of unannounced home visits, in lieu of scheduled appointments, and failure to make required contact with children, effective May 23, 2005, WCCB implemented a policy prohibiting unannounced home visits by caseworkers. (Exhibit O- Bianco Deposition, at 19-20.) (Exhibit P-Client Contact Policy effective May 23, 2005.) The policy, which has remained in place from 2005 to the present, provides that all contacts with clients must be by appointment unless an exception is approved by a caseworker's supervisor. (Exhibit P.) Pallatto was aware of WCCB's policy against unannounced home visits, but nonetheless continued to do such visits in violation of the policy. (Exhibit Q- Pallatto Deposition, August 2012, at 166-17.)

In 2006, WCCB issued Pallatto a warning for failing to maintain contact with a client, failing to complete required paper work, and failing to follow the instructions of her supervisor. (Exhibit R-Employee Conference Form dated February 18, 2005.) Pallatto was instructed to schedule family visits and keep appointments. (Exhibit R.)

In 2006, Pallatto was taking excessive sick time. On April 27, 2006, WCCB informally counseled Pallatto for six incidents of calling off sick during the first three months of the year. (Exhibit S-Employee Conference Form.) This escalated to formal counseling on September 6, 2006 based on Pallatto having 18 sick leave incidents as of July 31, 2006. (Exhibit U-Employee Conference Form.) On October 23, 2006, Pallatto received a written warning for taking sick time following the September 6, 2006 formal counseling. (Exhibit V-Employee Conference Form.) In response to the October 23, 2006 written warning, Pallatto filed a grievance in accordance with her union contract, which was heard by Arbitrator from the Pennsylvania Bureau of Mediation. The Arbitrator issued a written decision denying Pallatto's grievance on September 7, 2007. (Exhibit W-Grievance

Arbitration Decision dated September 7, 2007.) The Arbitrator found that Pallatto had accumulated twenty-five incidents of sick time use up to October 23, 2006, and, when asked the reason for her absences, she responded as follows:

> Pallatto testified that she was not feeling well on the days she took off, citing headaches and sleep problems. Supervision never asked her for doctor's excuses, and she offered none. She agrees that she was given an opportunity to explain her absences, and she claims that she did not abuse sick leave.

(Exhibit W at 4.) The Arbitrator observed:

> If [Pallatto] does have health issues that might explain her persistent absences, she has an obligation to notify the County and seek professional help. As matters now stand, however, her absences can only be seen as abuse of sick leave.

(Exhibit W at 6.) Pallatto did not appeal the Arbitrator's decision.

On March 15, 2007, Pallatto received written warning for having 32 sick time incidents in the prior 12 months. (Exhibit X-Employee Conference Form.) On August 22, 2007, she received another written warning for having 23 call-off incidents from August 2006 through July 2007. (Exhibit Y-Employee Conference Form.)

Despite her frequent use of sick time, Pallatto testified that, in 2008, she was not being treated by a doctor, did not know what was wrong with her, and had not provided WCCB with any written explanation for her use of sick leave. (Exhibit Q-Pallatto Deposition, August 2012, at 19-20.) However, on May 28, 2008, Pallatto submitted to WCCB an FMLA health care certification providing that she needed to take intermittent FMLA leave because of the following medical conditions:

> [Pallatto] has migraines which come on quickly & then [she] would either be unable to work or leave work. [Pallatto] also

> has sleep apnea which causes her to be drowsy or fatigued during the work day---she would be unable to perform her job. She also has restless legs.

(Exhibit Z-FMLA Certification of Dr. Scheler, May 2008, at 1.) Westmoreland County granted Pallatto intermittent FMLA leave, which continued throughout the remainder of her employment. (Exhibit CC-Pallatto Deposition, October 2012, at 21.) WCCB never denied any application by Pallatto for intermittent FMLA leave thereafter.[1] (Exhibit CC-Pallatto Deposition, October 2012, at 21.)

In January of 2008, WCCB received a complaint from a youth shelter reporting that Pallatto had failed to secure emergency dental treatment for a child under her supervision. (Exhibit EE-Complaint/Concern Documentation, February 12, 2008.) The child needed to have teeth extracted, and it was Pallatto's duty to secure consent for the procedure. (Exhibit EE.) Also, Pallatto failed to visit the child on a weekly basis, which is required, while he was housed in the youth shelter. (Exhibit EE.) When Westmoreland County suspended Pallatto for three days because of this violation, (Exhibit FF-Employee Conference Form), Pallatto again filed a grievance and arbitrated the dispute. Once again, the Arbitrator denied the grievance, finding that Pallatto failed to follow up with a child's medical care, violated Pennsylvania Department of Welfare regulations, and violated WCCB procedure by failing to visit a child in a shelter on a weekly basis. (Exhibit GG-

[1] Pallatto received a written warning for use of sick time on July 2, 2008. However, that written warning pertained to sick time Pallatto used between August of 2007 and March of 2008, which was prior to her application for intermittent FMLA leave. (Exhibit DD.)

Grievance Arbitration Decision, decided February 25, 2010, at 28-29.) Pallatto did not appeal the Arbitrator's Opinion and Award.

Pallatto was disciplined on February 15, 2008 for failing to immediately notify WCCB that a child in the custody of WCCB and under her supervision had given birth to a baby. Pallatto claimed that she delayed informing WCCB because, on the day she learned about the birth, she was busy, forgot about it, and then was sick the next day. (Exhibit HH- Employee Conference Form.)

Also, in 2008, WCCB warned Pallatto for failing to see children in their home at least bi-monthly, conducting unannounced visits without obtaining a waiver, failing to schedule monthly home visits, and failing to maintain monthly face-to-face contact with both children and parents. (Exhibit II-Employee Conference Form reflecting action taken on March 18, 2008 and April 15, 2008.) Despite repeated action by WCCB to correct her behavior, Pallatto willfully violated WCCB's policy and continued to conduct unannounced home visits. (Exhibit JJ-Bianco Memorandum dated January 12, 2009.) Pallatto claims to have attempted seventeen such home visits in December of 2008 alone. (Exhibit JJ.)

On September 3, 2008, Pallatto was counseled for (1) failing to prepare a court petition for an emergency shelter hearing for a child, which resulted in an untimely petition under Pennsylvania's Juvenile Law; and (2) taking time off without following the procedures of WCCB, which forced a supervisor to perform her duties. (Exhibits KK and LL-Employee Conference Forms dated September 3, 2008.)

In April of 2009, WCCB gave Pallatto a written warning because a Department of Public Welfare audit revealed that Pallatto had not visited two children since July of 2008.

(Exhibit MM-Employee Conference Form, April 28, 2009.) There was no documentation showing that the safety and risk to the two children had been assessed at any time since July of 2008. (Exhibit MM.) In September of 2009, WCCB again warned Pallatto that she was not to conduct unannounced home visits and that she was required to see children in the home or placement. (Exhibit JJ.) (Exhibit PP-Bianco Memorandum dated September 28, 2009.) In utter defiance, the unannounced home visits continued and almost always Pallatto claimed not to see children because nobody was home.

In 2009, Pallatto was diagnosed with lupus. (Exhibit Q-Pallatto Deposition, August 2012, at 21.) Although Pallatto claims to have informed her supervisor of the diagnosis, Pallatto did not request accommodation for any disability related to that disease. In fact, Pallatto testified that she was able to work in 2009, (Exhibit Q-Pallatto Deposition, August 2012, at 22), and she continued to work until March of 2010. (Exhibit CC-Pallatto Deposition, October 2012, at 44.) Pallatto was also diagnosed with major depression and severe arthritis. (Exhibit Q-Pallatto Deposition, August 2012, at 24.)

On August 16, 2009, Pallatto was involved in a motor vehicle accident, which caused cervical strain and cognitive problems that impacted upon her job performance as a caseworker. (Exhibit QQ-Records of the Alle-Kiski Medical Center, at 1.) In September of 2009, Pallatto reported to her physician that, following the August 16, 2009 accident, she was having thinking and memory problems, as well as episodes of "jamais-vu," which caused her to forget where she was while driving her vehicle. (Exhibit SS-Medical Office Note of Dr. Michel dated September 22, 2009.)

In 2009, Pallatto informed WCCB that she refused to work after 4:00 pm. (Exhibit TT-Bianco Memorandum dated September 29, 2009.) Because WCCB caseworkers are required to visit children in their home every month,[2] it was necessary for every WCCB caseworker, including Pallatto, to work after 4:00 pm, especially during the school year, (Exhibit O-Bianco Deposition, at 36-38), and flex time among caseworkers was customary. (Exhibit Q-Pallatto Deposition, August 2012, at 62-63.) To attempt to visit children on her caseload, Pallatto would resort to measures such as seeing children at a bus stop, which is not the child's home, and by performing unannounced home visits on days when children are not in school. (Exhibit Q-Pallatto Deposition, August 2012, at 121-22, 218-19.)

In September 2009, Pallatto was again warned that she must see every child on her caseload in their home or the child's placement or she would be disciplined for failing to do so. (Exhibit TT- Bianco Memorandum dated September 29, 2009.) Pallatto described her caseload as merely average-- not heavy or unusual---(Exhibit Q-Pallatto Deposition, August 2012, at 40-41), yet she was regularly not seeing all of her families. (Exhibit O-Bianco Deposition, at 28, 34-35.) Pallatto's supervisor had to step in and perform Pallatto's work, more than with any employee. (Exhibit O-Bianco Deposition, at 34-35.)

Because of her continuous failures to comply with statutory duties of case workers, by letter dated February 5, 2010, WCCB informed Pallatto of the following:

> As per our discussion, beginning February 1, 2010, you will be given the opportunity to make monthly face-to-face contacts

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[2] 42 U.S.C. §622(b)(17); 55 Pa. Code §3490.61.

> with the families and children on your caseload within the first two weeks of the month....
>
> If there is a failure to comply with this directive, the Agency [WCCB] reserves its right to set your schedule to assist you in complying with this directive. Your schedule will be set at 10:30 A.M. to 6:00 P.M., until the aforementioned contacts are made for that month. Please refer to our current union contract Article XIII, Work Week and Hour Regulations Section 2 & 3.
>
> This letter shall serve as your advanced written notice that your work schedule will be set from 10:30 am to 6 pm, beginning on Monday, or the first business day, the 3rd week of each month, if the above mandates are not met.

(Exhibit VV-Letter of McCallen dated February 5, 2010, at 1.) Essentially, the letter provided that, if Pallatto did not see the children in the first two weeks of the month, her hours would be modified until the children were seen.

Pallatto resisted working after 4:00 pm, claiming that it was difficult for her to do so. (Exhibit CC-Pallatto Deposition, October 2012, at 30.) However, after returning from time off work, Pallatto produced a medical slip from Dr. Carl Scheler, which provided the following:

> Pt. unable to work more than 37 ½ hrs per week due to extreme fatigue originating from her condition.

(Exhibit WW-Medical Note of Dr. Scheler dated February 16, 2010, at 1.) The medical slip said nothing at all about Pallatto's ability to work after 4:00 pm. Moreover, the 10:30 am to 6:00 pm schedule amounts to exactly 37.5 hour per week and is thus entirely consistent with Pallatto's medical slip. The schedule was also consistent with her

Collective Bargaining Agreement. (Exhibit C, at 7-8.) Pallatto was never ordered to work overtime.

On February 16, 2010, Pallatto reported to psychologist, Gary Brieisinger, that, since her motor vehicle accident, she was experiencing short term memory loss, constant fatigue, problems concentrating, and was inverting numbers and letters. (Exhibit RR, at 1.) Breisinger opined that Pallatto suffered from cognitive problems secondary to her motor vehicle accident, and that her difficulties at work were likely due to the after effects of post-concussion headache syndrome, worsening chronic pain syndrome, worsening fatigue due to Lupus, and being emotionally overwhelmed. (Exhibit RR, at 5-6.) Pallatto did not inform WCCB about these problems before she stopped working in March of 2010 or request accommodation for cognitive deficits.

On February 17, 2010, Pallatto engaged in insubordination by (a) scheduling herself out of the office without approval for an entire day at a time she needed to meet with her supervisor; and (b) by disregarding WCCB's orders and intentionally conducting an unannounced home visit in violation of WCCB policy. (Exhibit XX-Letter of McCallen dated February 17, 2010.)

Pallatto continued to refuse to work after 4:00 pm and, on March 12, 2010, WCCB met with Pallatto informed her that she was required to follow the 10:30 am to 6:00 pm schedule beginning on the next working day until her contacts with children were met. (Exhibit BB-Dominick Deposition, at 21.) Once done, her schedule would return to 8:00 am to 4:00 pm. (Exhibit VV.) She never worked the new schedule and, instead, went on medical leave and did not return to work thereafter. (Exhibit CC-Pallatto Deposition, October 2012, at 44.)

Pallatto submitted a medical excuse from E. Michel, M.D., dated March 14, 2010, stating that she could not return to work for ten days. (Exhibit ZZ-Medical Note of Dr. Michel, March 14, 2010.) Also, Pallatto had a medical excuse from Louis K. Hauber, M.D., dated March 30, 2010, stating that Pallatto could not return to work until further notice. (Exhibit AAA-Medical Note of Dr. Hauber, March 30, 2010.) Pallatto submitted a FMLA Heath Care Provider Certification to Westmoreland County on April 6, 2010, asking that she remain off work until cleared to return by her psychiatrist. (Exhibit CCC-FMLA certification by Dr. Michel, April 6, 2010.) Westmoreland County approved FMLA leave from March 25, 2010 through June 7, 2010, and a medical leave of absence from June 8, 2010 through July 23, 2010. (Exhibit DDD-Personnel Action Form, dated April 22, 2010.)

On July 7, 2010, Pallatto requested an indefinite medical leave of absence commencing on July 26, 2010, because she had pneumonia and sepsis, which was secondary to her Lupus and immunosuppression. (Exhibit FFF-Leave Request dated July 7, 2010.) Pallatto testified that she also suffered from Legionnaire's disease at that time. (Exhibit Q-Pallatto Deposition, October 2012, at 59.) On July 26, 2010, the same day on which she requested the commencement of indefinite leave, Pallatto informed Westmoreland County that she wanted to retire from her position as a caseworker, effective May 2010. (Exhibit GGG-Retirement Request received on July 26, 2010.) Westmoreland County granted Pallatto's request and she retired. (Exhibit CC-Pallatto Deposition, October 2012, at 62.)

STANDARD OF REVIEW

Summary judgment will granted if, drawing all inferences in favor of the non-moving party, the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Crawford v. Washington County Children & Youth Services., (W.D. Pa., No. 2:06-cv-1698, filed March 12, 2009), 2009 U.S. Dist. LEXIS 21635, *10-11.) The moving party has the initial burden to demonstrate the absence of a genuine issue of material fact. Id. Where the moving party does not bear the burden of proof, the initial burden may be met by demonstrating the lack of record evidence to support the opponent's claim. Id. Once that burden has been met, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial," or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. Id.

ARGUMENT

I. WCCB IS ENTITLED TO JUDGMENT AS A MATTER OF LAW REGARDING PALLATTO'S FMLA NOTICE AND RETALIATION CLAIMS.

A. *Pallatto's FMLA notice claim is without merit.*

Pallatto applied for and was granted intermittent FMLA benefits in 2008. She complains that WCCB did not give her notice of the FMLA and learned about the statute from a co-worker. However, Westmoreland County has had an FMLA policy since August of 1993, (Exhibit AA-FMLA Policy effective August 5, 1993), and FMLA information is posted in the workplace and given to new employees. (Exhibit BB-Dominick Deposition, at 13.)

Moreover, in 2008, 29 U.S.C. § 2619 did not establish a private cause of action for an employer's failure to post notice, but rather fined the employer $100.00 for the violation. Hayduk v. City of Johnstown, 580 F. Supp. 2d 429, 473 fn. 8 (W.D. Pa. 2008); Deily v. Waste Mgmt. of Allentown, 118 F. Supp.2d 539, 544 (E.D. Pa. 2000). Although the regulation governing the posting of FMLA notice, 29 C.F.R. §300, was amended effective January 16, 2009, to create new remedies for lack of notice, the amended statute is not retroactive and does not apply to Pallatto's 2008 claims. Hofferica v. St. Mary Med. Ctr., 817 F. Supp. 2d 569, 576 fn3 (E.D. Pa. 2011) (the court applied the FMLA regulations in force in 2008 when the FMLA violations allegedly occurred, and not the 2009 amendments); Kerns v. Drexell University, (E.D. Pa, No. 06-5575, filed 7/8/2009), 2009 U.S. Dist. Lexis 59147, *26, fn 9 (the FMLA, was amended non-retroactively).

Also, the FMLA provides no relief unless an employee has been prejudiced by the violation of the statute. Hayduk, 580 F. Supp. 2d at 473. Here, Pallatto testified that before her leave was granted in 2008, she was not under the care of a physician and did not even know what was wrong with her. (Exhibit Q-Pallatto Deposition, August 2012, at 19-20.) Under the 2008 regulations, an employee does not have "serious health condition" for purposes of FMLA leave unless the employee undergoes in-patient care or is receiving continuing treatment by a health care provider. 29 C.F.R. § 825.114 (2008 regulation). Therefore, Pallatto cannot claim prejudice.

When Pallatto finally submitted a physician certification to Westmoreland County explaining her need for FMLA leave, such relief was granted and never denied thereafter. (Exhibit CC-Pallatto Deposition, October 2012, at 21.)

Pallatto's use of numerous sick days prior to the grant of FMLA leave does not raise an issue of material fact regarding FMLA notice. The sick leave issue was fully and fairly litigated in grievance arbitration and never appealed. The Arbitrator ruled against Pallatto, specifically finding that she did not articulate a reason for taking so much sick time and that she had abused sick leave using it as a form of allotted days off. (Exhibit W-Grievance Arbitration Decision, September 7, 2007.)

The unappealed findings of the Arbitrator are conclusive pursuant to the doctrine of collateral estoppel. Federal courts apply the law of the state where the arbitration award was entered to determine whether *res judicata* or collateral estoppel is applicable. Brody v. Hankin, 145 Fed. Appx. 768 (3d Cir. 2005). Pennsylvania law is as follows:

> Under Pennsylvania law, arbitration proceedings and their findings are considered final judgments for the purposes of collateral estoppel. See Dyer v. Travelers, 392 Pa. Super. 202, 572 A.2d 762, 764 (1990) ("***An arbitration award from which no appeal is taken has the effect of a final judgment on the merits***."); Ottaviano v. Southeastern Pennsylvania Transp. Auth., 239 Pa. Super. 363, 370, 361 A.2d 810, 814 (1976); Restatement (Second) of Judgments § 84 (1982) ("[A] valid and final award by arbitration has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court."); Id. § 13 ("For purposes of issue preclusion … 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.")

Witkowski v. Welch, 173 F.3d 192, 199-200 (3d Cir. 1999) (emphasis added); State Farm Mut. Auto. Ins. Co. v. Makris, (E.D. Pa., filed March 4, 2003), 2003 U.S. Dist. LEXIS 3374, *47. All the elements of collateral estoppel are satisfied here.[3]

Therefore, WCCB is entitled to judgment as a matter of law on Pallatto's notice claims.

B. *WCCB did not retaliate against Pallatto for exercising her rights under the FMLA.*

To establish a prima facie case for retaliation under the FMLA, Pallatto has the burden to show (1) that she took FMLA leave; (2) that she suffered an adverse employment decision; and (3) that the adverse decision was causally related to her leave. Erdman v. Nationwide Insurance Co., 582 F.3d 500, 508 (3d Cir. 2009). Adverse employment actions are acts such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits ... A tangible employment action [that] inflicts direct economic harm." Burlington Industries v. Ellerth, 524 U.S. 742, 761-62 (1998).

WCCB never imposed any adverse employment action on Pallatto as defined in Burlington Industries. Pallatto's employment was not terminated, she was not demoted, she was not transferred, and her pay and benefits were not reduced. WCCB took no action that caused Pallatto economic harm. Pallatto's employment was suspended for three days in February of 2008; however, that suspension predated Pallatto's FMLA leave and was submitted to grievance arbitration, which Pallatto lost and never appealed.

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[3] Collateral estoppel applies when the following are met: (1) an issue of law or fact decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. Rue v. K-Mart Corporation, 552 Pa. 13, 713 A.2d 82 (1998).

Further, while Pallatto claims that she was subjected to various indignities by WCCB and Westmoreland County supervisors following the grant of FMLA leave, the record establishes that WCCB's actions were legitimate disciplinary measures related solely to Pallatto's ongoing failure to perform her duties, including her overarching duty to protect the welfare and safety of the children, violation of policy and child welfare regulations.

WCCB needed to modify Pallatto's work hours in March of 2010 to ensure that she performed the essential function of her job: protecting children. While Pallatto did not like the modification, the record demonstrates that the shift change was consistent with her medical restrictions, with the terms of her Collective Bargaining Agreement, and, most important, was designed to make certain that she visited the children in her case load. Pallatto's refusal to work after 4:00 pm until children in her caseload were seen was based solely on her subjective assertions that doing so was too hard on her, which were unsupported by any objective medical evidence. (Exhibit Q-Pallatto Deposition, October 2012, at 30.) In fact, Pallatto's claim was contradicted by her own physician who confirmed that she could work 37.5 hours per week without any kind of duty restrictions. (Exhibit WW-Medical Note of Dr. Scheler dated February 16, 2010.)

Pallatto cannot point to any evidence in the summary judgment record from which a fact finder could reasonably either (1) disbelieve WCCB's legitimate reasons for disciplining Pallatto and temporarily modifying her hours; or (2) believe that a retaliatory reason was more likely than not the motivating or determinative cause of WCCB's actions. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). There are no weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the record that a reasonable fact finder could resolve against WCCB and infer that the WCCB was acting for retaliatory reasons. Id., 32 F.3d at 765.

Therefore, WCCB is entitled to summary judgment on this issue.

II. WCCB IS ENTITLED TO JUDGMENT AS A MATTER OF LAW WITH REGARD TO PALLATTO'S DISCRIMINATION/HOSTILE WORK ENVIRONMENT CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT AND THE PENNSYLVANIA HUMAN RELATIONS ACT.

In ADA discrimination cases, the Third Circuit applies the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). Once an employer presents a non-discriminatory reason for termination, the burden under the ADA shifts to the employee to present evidence contradicting the core facts put forward by the employer as the legitimate reason for its decision. Kautz v. Met-Pro Corp., 412 F.3d 463, 467 (3d Cir. 2005). The employee must show "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's proffered reason for its action, which a reasonable fact-finder could find unworthy of credence, and thus infer that the employer's asserted non-discriminatory reasons were pretextual or fabricated. See Fuentes, 32 F.3d at 765 (3d Cir. 1994). Here, WCCB's legitimate non-discriminatory reasons for its actions are legion, and Pallatto has not produced evidence contradicting those overwhelming reasons.

A. *WCCB did not discriminate against Pallatto because of a disability.*

To establish a prima facie case of discrimination under the ADA, Pallatto must show (1) that she is a disabled person within the meaning of the ADA: (2) that she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) she has suffered an otherwise adverse employment decision as a result of discrimination. Taylor v. Phoenixville School District, 184 F.3d 296, 306 (3d Cir. 1999). A "disability" is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment, or being regarded as having such an impairment. 42 U.S.C. § 12102(2); Taylor.

Pallatto never informed WCCB that she suffered from any specific medical diagnosis until 2008, when she applied for FMLA leave based on migraines, sleep apnea, and restless legs. (Exhibit Z-FMLA Certification of Dr. Scheler dated May 2008.) She was not diagnosed with lupus until 2009. (Exhibit Q-Pallatto Deposition, August 2012, at 21.) Merely having a medical diagnosis, without more, is insufficient to support disability status under the ADA. Bialko v. Quaker Oats, 434 Fed Appx. 139, 142 (3rd Cir. 2011), citing Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 198 (2002). Prior to the time she stopped working, Pallatto did not report to WCCB or provide medical evidence showing that her health problems substantially limited a major life activity, such as walking, seeing, hearing, speaking, or other activity that an average person can perform with little or no difficulty. Marinelli v. City of Erie, 216 F.3d 354, 361-62 (3d Cir. 2000). Instead, she proffers only self-serving claims regarding medical symptoms, conditions, and her desire not to work after 4:00 pm.

Most important, when she finally received a medical diagnosis, Pallatto did not inform WCCB that she had a disability and did not ask WCCB to accommodate any disability. In fact, Pallatto testified that she was able to work in 2009 after being diagnosed with lupus. (Exhibit Q-Pallatto Deposition, August 2012, at 22.) Pallatto had an obligation to request an accommodation for a disability, and, in the absence of such a request, the burden never shifted to WCCB to engage in the interactive process to determine an appropriate accommodation. Taylor; Stadtmiller v. UPMC Health Plan, Inc., (W.D. Pa., No. 09-884, filed June 29, 2011), 2011 U.S. Dist. LEXIS 73277. Also, it is important to note that, when Pallatto finally stopped working in March of 2010, WCCB agreed to Pallatto's request for medical disability leave. (Exhibit DDD-Personnel Action Form, dated April 22, 2010.)

Pallatto testified in her deposition that she asked WCCB for permission not to work after 4:00 pm. However, she never provided WCCB with medical reason to support that request. In fact, Pallatto's physician reported that Pallatto could work 37.5 hours per week, and WCCB never asked her to exceed that limitation. (Exhibit WW-Medical Note of Dr. Scheler dated February 16, 2010) Also, permitting Pallatto not to work after 4:00 pm would have been inconsistent with WCCB's mission to protect children.[4]

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[4] Even if WCCB had required Pallatto overtime, which it did not, the Third Circuit has stated that a plaintiff's inability to work overtime is not a substantial limitation on the ability to work for purposes of the ADA. Bialko, 434 Fed. Appx. at 142.

Pallatto cannot show that any disciplinary action taken by WCCB was motivated by a discriminatory animus. Rather, WCCB took reasonable steps to deal with Pallatto's failure to perform critical job duties, including visiting and supervising for children, abuse of sick leave, and repeated violations of WCCB policies and child welfare regulations.

Furthermore, a person who does not perform her job adequately is not a qualified individual for purposes of the ADA. Meyers v. Conshohocken Catholic School, (E.D. Pa, No. 03-4693, filed December 30, 2004), 2004 U.S. Dist. LEXIS 26135, *24-28; see also Tyndall v. National Education. Centers., 31 F.3d 209, 213 (4th Cir. 1994) (an employee who does not attend work is not qualified under the ADA). An employer need not eliminate the essential functions of a position in order to accommodate an employee's disability; nor are employers required to accommodate illnesses by allowing an employee to miss work whenever and for however long the employee is ill. Meyers, *27-28. Considering Pallatto's ongoing failure to perform fundamental work duties, and her ongoing noncompliance with policies and regulations, Pallatto cannot establish that she is a qualified individual for purposes of the ADA.

WCCB produced evidence showing that it had legitimate, non-discriminatory reasons for its employment actions. Pallatto has not produced evidence contradicting these core facts. There is no evidence showing that WCCB's asserted non-discriminatory reasons were pretextual or fabricated. Therefore, WCCB is entitled to summary judgment on Pallatto's ADA and PHRC claims.

B. ***WCCB did not subject Pallatto to a hostile work environment.***

In order to establish a prima facie case for an ADA-hostile work environment claim, Plaintiff must first prove that she has a disability. Del Tinto v. ClubCom, LLC, (W.D. Pa., No. 12-cv-0070, filed November 15, 2012), 2012 U.S. Dist. LEXIS 163523, *72. Further, a claim for harassment based on disability requires an employee to show that (1) she is a qualified individual with a disability under the ADA, (2) she was subject to unwelcome harassment; (3) the harassment was based on her disability or a request for an accommodation; (4) the harassment was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment; and (5) that the employer knew or should have known of the harassment and failed to take prompt effective remedial action. Walton v. Mental Health Association, 168 F.3d 661, 666-667 (3d Cir. 1999). The ADA only proscribes harassment that is based upon an employee's disability. Barclay v. AMTRAK, 240 Fed. Appx. 505, 508 (3d Cir. 2007).

For the reasons stated supra, Pallatto was not a qualified individual with a disability.

Moreover, Pallatto was never harassed by WCCB. Rather, Pallatto was the subject of numerous legitimate disciplinary, supervisory, and remedial measures that were implemented because Pallatto was not performing critical aspects of her job. Pallatto consistently failed to comply with WCCB rules and standards: she intentionally violated WCCB's policy against unannounced home visit; she failed to see a child in a shelter on a weekly basis; failed to appear for court, and routinely failed during her fifteen years of employment to maintain her caseload and dictation. (Exhibits E-V, X-Y, EE-FF, HH-PP, XX-YY.) Pennsylvania's Department of Welfare determined that Pallatto had violated safety assessment and risk assessment bulletins by failing to see children in the home.

(Exhibit MM-Employee Conference Form dated April 28, 2009.) Furthermore, two major areas of dispute--Pallatto's excessive use of sick time and her failure to facilitate medical care for a child in a youth shelter---were fully and fairly addressed in grievance arbitration proceedings, which Pallatto lost and never appealed. (Exhibit W-Grievance Arbitration Decision, September 7, 2007.) (Exhibit GG-Grievance Arbitration Decision decided February 25, 2010.)

Pallatto asserts that WCCB harassed her about lunches and mileage. However, the record demonstrates that Pallatto provoked the scrutiny of WCCB and the County Controller by ordering excessive lunches (eight double cheeseburgers at one time) and by inaccurately reporting her mileage. (Exhibit O-Bianco Deposition, at 22-23, 24-25.) (Exhibit O-Bianco Deposition, at 25.) In any event, close supervision of an employee is insufficient to give rise to a hostile work environment claim. McKinnon v. Gonzales, 642 F. Supp. 2d 410, 423 (D. N.J. 2009).

The ADA does not prevent an employer from taking employment actions vis-a-vis the employee; nor is an employer required to give employees with disabilities special treatment, evaluate them on a lower standard, or discipline them less severely than any other employee. Westfall v. Vanguard Group, Inc., (E.D. Pa., No. 06-4320, filed June 8, 2007), 2007 U.S. Dist. LEXIS 41777,*11. Because Pallatto was not performing fundamental job functions, WCCB's employment actions were reasonable and did not constitute harassment.

III. WCCB IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PALLATTO'S CONSTRUCTIVE DISCHARGE CLAIMS.

A. *Because WCCB is entitled to judgment on Pallatto's discrimination, retaliation and hostile work environment claims, her constructive discharge claims must also fail*.

Pallatto contends that she was forced to retire from her employment as a caseworker because of discrimination, retaliation, and a hostile work environment, which were related to her disability and FMLA leave. However, for all of the reasons stated *supra*, Pallatto's discrimination, retaliation, and hostile work environment claims are without merit. Consequently, because those claims must fail, Pallatto's constructive discharge claim must also fail. Clayton v. Pa. Department of Public Welfare, (M.D. Pa, No. 4:CV 05-0768, filed February 20, 2007), 2007 U.S. Dist. LEXIS 11840, *37; Brooks v. CBS Radio,(E.D. Pa., No. 07-0519, filed December 17, 2007), 2007 U.S. Dist. LEXIS 92213, *51

B. *The objective evidence shows that Pallatto retired at a time when she was afflicted with multiple severe medical conditions, and her subjective reasons for leaving employment are insufficient to raise a question of material fact*.

The record shows that Pallatto herself decided to retire from her job at the same time that her medical condition declined precipitously and she was experiencing cognitive problems caused by her non-work-related motor vehicle accident. (Exhibit QQ-Records of the Alle-Kiski Medical Center, at 1.) (Exhibit RR-Report of Gary Breisinger, at 5.) (Exhibit SS-Medical Office Note of Dr. Michel, dated September 22, 2009.)

On May 5, 2010, Pallatto completed a Social Security Disability function report, wherein Pallatto represented it was difficult for her to perform even everyday activities such as dressing, bathing, and hairstyling. Pallatto reported that she could not concentrate to balance a checkbook, could not maintain her attention long enough to read a paragraph of a book, had difficulty following written instructions, and that every activity caused her pain. (Exhibit EEE-Social Security Function Report, at 2, 4, and 6, and Supplemental Function Questionnaire on Pain, at 1.)

On July 7, 2010, Pallatto submitted to Westmoreland County a request for an indefinite medical leave of absence to commence on July 26, 2010. Pallatto informed WCCB that she needed indefinite medical leave because she had pneumonia and sepsis, secondary to her Lupus and immunosuppression. (Exhibit FFF-Leave Request dated July 7, 2010.) Pallatto testified that, at the same time, she was suffering from Legionnaire's Disease. (Exhibit CC-Pallatto Deposition, October 2012, at 59.) Pallatto testified that she almost died from these conditions and was hospitalized for one week. (Exhibit CC-Pallatto Deposition, October 2012, at 59-60.) Pallatto has not produced a medical opinion stating that her employment aggravated or played any role at all in those diseases.

Pallatto applied to Westmoreland County for disability retirement on the very same day that her indefinite medical leave of absence was to commence, July 26, 2010. (Exhibit (GGG-Retirement Request received on July 26, 2010.) Pallatto was ultimately awarded Social Security Disability benefits, based on Lupus, depression, fatigue, arthritis, and migraines. (Exhibit HHH-Social Security Decision.)

Pallatto testified that she retired because she could not think of WCCB without having anxiety, she was depressed, and because the situation at WCCB was "all bad." (Exhibit CC-Pallatto Deposition, October 2012, at 67.) However, an employee's subjective perceptions do not govern a claim of constructive discharge. Clowes v. Allegheny Valley

Hospital, 991 F.2d 1159, 1162 (3d Cir. 1993); Stove v. Philadelphia School District, 58 F. Supp. 2d 598, 604 (E.D. Pa. 1999) (the fact that an employee suffered from depression and anxiety is not sufficient to establish a claim of constructive discharge). All of the objective evidence regarding Pallatto's medical condition after February 2010 demonstrates that Pallatto was afflicted with medical problems and cognitive deficiencies unrelated to her employment, and that these problems became acute at about the same time she applied for retirement. Pallatto's claimed subjective reason that she retired because WCCB was "all bad" and made her feel anxious and depressed are insufficient to raise a question of material fact.

CONCLUSION

For all of the foregoing reasons, WCCB's motion for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this __4TH___ day of February, 2013, a true and correct copy of the foregoing **Brief in Support of Defendant's Motion for Summary Judgment** has been forwarded to the Clerk of Court for filing and uploading to the CM/ECF system, which will send notification of such filing to the following:

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